IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 244 of 1995

Hon'ble MR.JUSTICE Y.B.BHATT

and

Hon'ble MR.JUSTICE J.R.VORA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

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UDAJI FULAJI THAKORE

Versus

STATE OF GUJARAT

Appearance:

MR VT ACHARYA for Petitioner

MR KG SHETH, APP for Respondent

CORAM : MR.JUSTICE Y.B.BHATT

and

MR.JUSTICE J.R.VORA

Date of decision: 01/08/2002

ORAL JUDGEMENT

(Per : MR.JUSTICE J.R. VORA)

1. This appeal is directed against the judgement and order dated 31st January 1995 of the Additional Sessions Judge, Ahmedabad (Rural), Mirzapur, in Sessions Case No.22/93, convicting the present appellant i.e. original accused of Sessions Case No.22/93 for charges levelled against him under section 302 and 342 of IPC and sentencing him for life imprisonment and fine of Rs.5000/- in default to undergo rigorous imprisonment of two years. No separate sentence for charge levelled against the appellant under section 342 of IPC was awarded.

2. As per the case of the prosecution the incident in question occurred on 31st October 1992. It appears from the record that the appellant and the deceased in this case Bulaji Rumalji, were relatives because the niece of the accused Udaji Fulaji Rathod was married to son of deceased Bulaji Rumalji. The incident occurred at village Silotiya at about 14 hours. Gitaben, wife of appellant-accused had gone to the family of deceased Bulaji Rumalji. It is revealed that on this account there was some dispute between the accused and his wife Gitaben. On the day previous to the incident Gitaben had been to the house of deceased Bulaji and she was then sent to village Vanch where her parents resided by the deceased. Son of the deceased Bulaji i.e. Balaji accompanied Gitaben to village Vanch and according to the prosecution case Gitaben thereafter was at village Vanch. On the day of the incident i.e. on 31st October 1992 the accused-appellant came to the deceased Bulaji Rumalji and scolded him saying that why his wife was sent by Bulaji to Vanch and Bulaji should bring her back to the appellant. On this issue it appears that the dispute arose between the deceased and appellant. In the afternoon the deceased was called by the appellant at the field of the appellant. From the field of the appellant the deceased was taken to the residence of the appellant and at the residence the deceased was beaten by the appellant with a stick all over the body after fastening the deceased with a rope. The prosecution case further reveals that two sons of the deceased viq. Kalaji and Babuji along with family member Manekben and other three to four persons went to the field of appellant where the appellant was beating the deceased. After seeing the persons coming to the field the appellant ran away. The deceased Bulaji Rumalji was seriously injured and was

taken to Behiyal Outpost Police Station where Head Constable Lalji Maganji Thakore (PW12) recorded the complaint of the deceased and the deceased was sent to Dehgam hospital. The prosecution case further reveals that from Dehgam the deceased was transferred to Ahmedabad Hospital where on 3rd November 1992 at 12.57 hours during treatment Bulaji died. The investigation was then transferred to Champaksinh Harisinh Jhala, Police Inspector, LCB Police Station, Ahmedabad. Dead body was sent for postmortem and Dr. Vijay Rajnikant Shah (PW1) conducted postmortem of the dead body. After investigation a chargesheet for the above said charges came to be submitted by the police against the present appellant in the court of Judicial Magistrate (First Class) at Dehgam. The case was thereafter committed to the Court of Sessions where vide Exh.16 a charge was framed against the present appellant to which he pleaded not guilty. The prosecution examined 13 witnesses and produced documentary evidence. After recording the statement of the appellant under section 313 of the Criminal Procedure Code and after hearing both the sides the learned trial judge convicted the appellant as aforesaid. Being aggrieved this appeal is preferred by the appellant through jail.

3. Learned advocate for the appellant appointed is not present, while learned APP Mr. K.G. Sheth was heard at length. We have carefully gone through the testimonial evidence as well as documentary evidence on the record of the case. As per the prosecution case, PW1 Dr. Vijay Rajnikant Shah is examined at Exh.27 who conducted autopsy on the dead body on 4th November 1992 between 10 am and 10.30 am. The doctor found that the deceased had 11 external injuries including fractures of five ribs. The deceased had corresponding internal injuries. The doctor opined that those injuries were sufficient in the ordinary course of nature to cause death. The doctor also stated that the death is caused due to shock and hemorrhage resulting from the injuries sustained by the deceased. From the evidence of doctor it is clearly established that the death of the deceased was homicidal death. Now from the evidence available on record we shall examine whether the prosecution was able to prove the case against the present appellant for committing the murder of deceased Bulaji.

4. We have extensively gone through and perused the evidence on record. It is found that the prosecution has examined Radhabhai Somaji (PW2-Exh.29) and Gobarji Kalaji (PW3-Exh.31) as Panch witnesses of Panchnama Exh.30.

Panchnama of Exh.30 is in respect of the scene of offence. Both the witnesses PW2 and PW3 have not supported the panchnama Exh.30. It is pertinent to note that Exh.30 Panchnama makes it clear that the scene of offence was near the house of the appelant. The place of occurrance is described in detail in the said panchnama by four boundaries. We noticed that the prosecution proposes place of occurrance near the house of the appellant. PW4 Maheshbhai B. Rathod (Exh.32) and PW5 Vinubhai Himmatlal (Exh.36) were examined by the prosecution as panch witnesses of panchnamas Exh.34 and 36. Exh.34 is the panchnama drawn on 11th November 1992 which is in respect of the arrest of the present appellant while Panchnama Exh.35 is in respect of discovery of rope and stick at the isntance of the appellant. The prosecution case is that on arrest the appellant disclosed the whereabouts of stick and rope which were then discovered from near his house from thorn bushes. However, PW4 and PW5 have not supported any of the panchnamas Exh.34 or 35. They completely denied the facts of the panchnama except putting signatures to each of the panchnamas.

6. PW6 Abhaji Vajaji (Exh.37), PW7 Gokaji Laxmanji (Exh.34) and PW8 Bharatji Laxmanji (Exh.39) are the witnesses of the incident. None of these witnesses has supported the prosecution case and the prosecution was permitted to cross-examine all these three witnesses. The prosecution case as revealed was that all the three witnesses were sitting on the Otla of the Falia. All of them, according to prosecution case, witenssed the appellant beating the deceased Bulaji. Bulaji was tied with the rope and at that time Kalaji, son of Bulaji came towards the house of the appellant and on noticing that Kalaji was coming towards him, the appellant untied the rope and along with the stick and rope ran towards the sim of the village. This case of prosecution is not supported by any of these eye witnesses. We, therefore, noticed that the prosecution presented a case that the deceased Bulaji was beaten by the appellant near his house which was witnessed by PW6, PW7 and PW8, and on seeing Kalaji moving towards the house of appellant, he ran away from the scene of offence. Now the issue to be decided is whether this case of the prosecution is proved beyond reasonable doubt or not.

7. The evidence of PW No.9 Babuji Bhulaji (Exh.41), PW10 Manekben Keshaji, and PW11 Kalaji Bhulaji Exh.43 is required to be discussed at length. Babuji Bulaji (PW9) is son of the appellant. He has stated that on the previous day of the incident wife of appellant came to

their residence and on the next day his brother Kalaji accompanied Gita and left her at village Vanch where her parents resided. On the next day the appellant came to their residence. The appellant scolded his father and stated that his father had sent Gita to village Vanch and that therefore his father (the deceased) should bring Gita back. There was some exchange of hot words and thereafter Udaji Fulaji (appellant) had called his father Bulaji and had taken him to his field. According to this witness his brother Kalaji followed them. The appellant threatened Kalaji that Kalaji also would be beaten by him and hence Kalaji returned home and talked to Manekben and other witnesses. Therefore all the three witnesses went to the field of appellant and noticed that Bulaji was tied with a rope to a tree and the present appellant was beating him with stick. The deceased was seriously injured and on noticing that PW9, PW10 and Pw11 were coming to the field the appellant untied the rope and along with the rope and stick went towards the sim of village. This witness further states that with the help of PW6, PW7 and PW8 the deceased was shifted to the house on a cot. In the cross-examination he categorically stated that no residential houses are situated in the field. He stated that his father was profusely bleeding. The cot on which the deceased was carried was blood-stained and the ground near the tree with which the deceased was tied was also blood-stained. PW10 Manekben (Exh.42) also states that Kalaji informed them that the appellant was beating deceased Bulaji and Bulaji was tied to a Kanji tree. Therefore Kalaji and other witnesses went to the field of the appellant where they noticed that Bulaji was tied to a kanji tree and the appellant was beating him with a stick which had iron rings. In the cross-examination this witness also admits that the field was admeasuring 2 vighas and there was no residential house in the field. She stated in the cross-examination that the rope with which Bulaji was tied was 10 hands long in length. She has stated that the wife of appellant Gitaben was with the police when the police recorded her statement.

8. The prosecution witness Kalaji Bulaji at Exh.43, the son of the deceased, stated that wife of the appellant came to their residence who was sent to village Vanch. On the next day the appellant visited their house and after exchange of some words, Bulaji was taken by the appellant to his residence at about 2 O' clock in the noon. After 15 minutes he also followed them. This witness states that from the distance of 10 to 15 feet he saw that his father was tied with the tree of Kanji and appellant was beating him. In chief examination he

changes his version and says that except him nobody came to the place of the incident. Thereafter again when he was asked by the Court, he stated that Balubhai and Manekben came to the residence of the appellant. In his cross-examination, however, he has stated that the complaint which his father lodged before Bahiyal police outpost was in fact given by him.

9. PW12 (Exh.45) Lalji Maganji Thakore and PW13 (Exh.47) Champaksing Harising are the investigating officers who were examined by the prosecution at Exh.46. Complaint recorded by PW12 Lalji Maganji Thakore of the deceased is produced by the prosecution.

10. Learned trial judge relied upon the complaint Exh.46, and the evidence of Babuji Bulaji (PW9), Mankenben Keshaji (PW10) and Kalaji Bulaji (PW11) and came to the conclusion that after the death of the deceased Exh.46 was a dying declaration and Exh.46 finds support from PW9, PW10 and PW11 who are eye witnesses. The learned trial judge rejected the contention of the defence that there are contradictions between the evidence of the eye witnesses and Exh.46.

11. While reappreciating the evidence, we are of the opinion that the case falls within the narrow compass, to the extent whether the evidence of PW9, PW10 and Pw11 i.e. Baluji Bulaji, Manekben Keshaji and Kalaji Bulaji is credible and inspries confidence. At the same time it is also to be seen whether Exh.46, the complaint given by the deceased, is sufficient evidence to connect the appellant with the crime.

12. While scrutinising the evidence of PW9, PW10 and PW11, some major and vital contradictions are noticed. The contradiction which goes to the root of the prosecution case is in respect of the scene of offence. It is the duty of the prosecution to prove the scene of offence i.e. place of occurrance, categorically and with cogent clarity. As stated above, from the evidence of eye witnesses it clearly transpired that the incident took place in the field of the appellant. We find it amply clear from the evidence of PW9 Babuji Bulaji, PW10 Manekben Keshaji and PW11 Kalaji Bulaji that PW11 Kalaji followed the appellant and the deceased, and that it was in the field that the deceased was being beaten by the appellant. Kalaji returned home and found Babuji and Manekben. Thereafter PW9, PW10 and Kalaji went to the field of the appellant where they found that the deceased was tied with a tree of Kanji and was being beaten by the appellant. If we advert to the original case of the

prosecution we find that the prosecution professed the case that the appellant called the deceased, took him to the residence of the appellant and the deceased was beaten near the house of the appellant. This prosecution case is amply evident from the Panchnama of scene of offfence. From the cross-examination of the learned APP of the hostile panch witnesses and even from the evidence of the Investigating Officer PW12 Lalji Maganji Thakore (Ex.45) it is clear that the investigation did not reveal that the incident took place in the field. This investigating officer goes to the extent of saying that his investigation also did not reveal that the appellant was beaten after being tied to a Kanji tree. The net result of this appreciation of evidence is that the prosecution failed, primarily to prove the scene of offence, and there is a major contradiction in the prosecution case in respect of place of occurance. It is not the case of the prosecution that the field and the house of the appellant are adjoining or even situated nearby. If the case of the prosecution is that the incident occurred near the residence of the appellant and PW9 Babuji Bulaji, PW10 Manekben and PW11 Kalaji are the witnesses of incident, then there is no creditworthiness in their evidence. The question arises as to how the incident had occurred and where. The case of prosecution is self-contradictory on the aspect of how the incident occurred. The investigating agency denies the case of the prosecution witness that the deceased was beaten after being tied to the Kanji tree at the field, while eye witnesses state absolutely contrary to this version. The attempt to establish that the deceased was beaten at the field of appellant and he was fastened by rope with a tree by the appellant is highly doubtful. The manner in which the incident occurred and the scene of offence where the incident occurred are vital part of the prosecution case and when a contradiction arises as to the manner of the occurrence of the incident and as to the place of scene of offence, the case of prosecution becomes doubtful. This is so because when the eye witnesses are not cogent about the place of occurrance and the manner of occurrance of incident, the only conclusion which can be drawn is that the witnesses are not creditworthy and that they rope in the accused or they deliberately conceal the genesis of the prosecution case.

13. We, therefore, are not inclined to place any reliance on prosecution witness No.9 Babuji Bulaji, PW10 Manekben and PW11 Kalaji. There are other reasons to disbelieve them. When we scrutinise the evidence, further we find that the witnesses have stated such

improbabilities which go to the root of the case. Witness Babuji PW9 states that on noticing them, the appellant untied the rope and ran away towards the sim of the village with the rope. Manekben states that the said rope was about 10 hands long. If we appreciate this fact by the logic of a prudent person, we find that it is impossible for the appellant to untie the long rope and to run way before the witnesses reached the scene of offence. Manekben in her cross-examination states that Gitaben accompanied the police when the police recorded her statement and this fact was denied by PW12 Lalji Maganji Tahkore, the first investigating officer who recorded the statement of Manekben. PW11 Kalaji Bulaji in the examination in chief conveniently avoids stating the exact place of scene of offence. This is so because according to the prosecution case this is the witness who indicated the exact place of offence to the police and that place was near the residence of the appellant. In his deposition Kalaji fumbles and at one stage he deposes that only he reached the scene of offence and none-else was there. He also avoided to state that he once returned from the scene of offence to his house and called other witnesses. At one stage this witness states that witness Babubhai and Manekben accompanied him to the residence of the appellant, directly in contradiction with PW9 and PW10. Therefore on the facts and circumstances of the case, no reliance can be placed on the version of any of the witnesses i.e. PW9, PW10 and PW11.

14. The learned Trial Judge considered the complaint Exh.46 to be the dying declaration. There cannot be any two views on the principle that the statement made as to the cause of death can be treated as dying declaration. Therefore the issue is whether Exh.46 - complaint given by the deceased, even if it is treated to be a dying declaration, what evidentiary weight it carries. Learned Trial Judge however found support from PW9, PW10 and PW11 to lend credence to Exh.46 complaint. While appreciating the evidence, we found as aforesaid that the evidence of none of the witnesses out of PW9, PW10 and PW11 is creditworthy, meaning thereby that even if Exh.46 is a dying declaration, it finds no support from any other evidence. This is not enough. Mainly Exh.46 does not inspire any confidence because it is inconsistent and absolutely in contradiction to the other evidence of prosecution on record as stated above. We have discussed in detail about the place of offence. We are of the opinion that the change of scene of offence is a major contradiction and the prosecution case becomes doubtful. When the complaint Exh.46 given by the deceased is read

in evidence, we find that the complainant stated that the scene of offence was at the residence of the appellant. The case of the prosecution, which is revealed in the evidence of PW6, PW7 and PW8 i.e. Abbaji Vajaji, Gokaji Laxmanji and Bharatji Laxmanji is to the effect that they went to the field of the appellant along with PW9, PW10 and PW11. All of them found the deceased seriously injured, was placed on a cot and was taken home. This case of prosecution is contradicted in the dying declaration i.e. complaint Exh.46 by the complainant that the scene of offence was near the house of the appellant. If the deceased was so injured that he was required to be carried on a cot, then in these given circumstances, it was the duty of the prosecution to prove that after so many injuries and admittedly when he was carried on a cot, the deceased was capable lodging the complaint before Bahiyal Outpost police station.

15. In this respect it is pertinent to note that the law gives sanctity to a dying declaration because the law presumes that a person on a death bead would not lie. Therefore it was required by the prosecution to prove that the circumstances existed leading to imminent danger to the life of the deceased and in such circumstances, the complaint lodged by the deceased should be given more sanctity than a mere complaint. True it is that Exh.46 may be relevant as per the Evidence Act as a statement as to the cause of death. But so far as the reliability of the complaint lodged is concerned, it is required to be proved by the prosecution by cogent evidence that the deceased was in imminent danger of death and in those circumstances he offered the statement as to cuase of his death. The prosecution has failed to produce any treatment papers in respect of the treatment which the deceased received at Dehgam hospital as well as at the hospital at Ahmedabad.The Court is in complete dark as to whether the deceased was conscious enough till he died on 3rd November 1992 during treatment. If the deceased was not that conscious the complaint lodged by him vide Exh.46 becomes doubtful and if the deceased was conscious, then no attempts at all was undertaken to get the statement recorded by the Executive Magistrate. When we read the complaint at Exh.46 we find that there are some inherent improbabilities. The deceased stated that he was called by the appellant first to his field and then he was taken to the house. We fail to understand that why the appellant should undertake this exercise, firstly to call him to the field and then to take the deceased to his residence. Likewise the statement is also silent about PW9, PW10 and PW11 who visited him and rescued him from further beating.

16. On reappreciating the evidence, especially the evidence of PW9, PW10 and PW11, we are unable to sustain the conclusion of the trial judge that the complaint Exh.46, being dying declaration, is a reliable piece of evidence to convict the accused with the crime, as the complaint finds no support from any other evidence of the prosecution. Exh.46 when appreciated separately and as sole evidence, we find that the same is inconsistent and in contradiction to the prosecution case. No conviction can be sustained solely relying on Exh.46.

17. For the reasons aforesaid, since the prosecution has failed to prove beyond reasonable doubt the case against the appellant, the benefit of reasonable doubt must be given to the accused appellant. We are therefore of the opinion that the impugned judgement cannot be sustained and the same is required to be reversed.

18. In this view of the matter the impugned judgement dated 31st January 1995 as delivered by Additional Sessions Judge, Ahmedabad (Rural), Mirzapur, in Sessions Case No.22/93 convicting the appellant for the charges levelled against him is set aside. The appeal of the appellant is allowed. The appellant is acquitted of the charges levelled against him in respect of sections 302 and 342 of IPC in Sessions Case No.22/93 of the Court of Sessions, Ahmedabad (Rural), Mirzapur. The appellant be released forthwith if he is not required to be detained for any other purpose. The order of trial court in respect of Muddamal is sustained and no interference is called for so far as order of seizure of muddamal is concerned.

[Y.B. BHATT J.]

[J.R. VORA J.]

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